THE LOS ANGELES BAR ASSOCIATION

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RETIRING PRESIDENT WRIGHT REPORTS TO MEMBERS ON ASSOCIATION'S AFFAIRS

To the Officers, Board of Trustees, and Members of the Los Angeles Bar Association:

IT has long been my conviction that at the end of each year the retiring President should render to the members a report of the affairs of the Association, and to make recommendations and observations, and to comment thereon.

Before attempting to fulfill this obligation may I first give expression to my deep appreciation of the understanding and wholehearted cooperation of the other officers, Board of Trustees, Chairmen of the various committees, and membership of the Association. Whatever success we have had during the past year, I attribute entirely to the splendid work and devotion of these fine men.

The performance of the duties of President of the Association is a strenuous job but the time consumed and the effort expended amount to nothing when compared with the many delightful associations and contacts the position affords, and the opportunity of participating in the interesting work which the Association carries on.

It has been particularly gratifying that we have had the unqualified and active cooperation of the officers and members of our affiliated associations, also, in every instance, and there were several during the year, when we have requested assistance from various civic and kindred associations in this community, it has been given. Particularly is this true of the Los Angeles Chamber of Commerce, under the able leadership our own Byron C. Hanna.

MEMBERSHIP

We closed the year with an active membership of 1831. This membership, when you consider there are but approximately 3500 lawyers actively engaged in practice in the whole county of Los Angeles, is most satisfactory. However, it seems to me that every member who holds the conviction that the Association is worth while, should make it his aim to interest every lawyer of good standing in the community to become a member. It is quite obvious that the Association is working for the good of all lawyers in the community, and that all should help bear their proper measure of the responsibility, whether it be financial or otherwise.

The year just closed is the first in which the advanced rate in dues has been effective. Increasing the dues, in my opinion, has been one of the most constructive things we have done for a long time. I have long held the conviction that the average member would be willing to pay a little more if in return the activities and accomplishments of the Association were broadened. We pay less dues in our Association than are paid in any other comparable Association in the United States. I am convinced that we should again raise the dues and that the moneys so furnished will permit us to accomplish many things that we as an Association should strive to accomplish.

FINANCES

This is the first time for several years that we have ended the year with a surplus after paying or charging off accounts payable, incurred in the previous December.

I point this out specifically, not because of any personal feeling of accomplishment, but because I believe it is a fine step forward and it indicates that we

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NEW OFFICERS AND TRUSTEES FOR 1938

FRANK B. BELCHER
President

THE following officers and trustees for 1938, will be installed at the regular meeting of members to be held at the University Club, February 24:

President, Frank B. Belcher
Senior Vice-President, Allen W. Ashburn
Junior Vice-President, Herbert Freston

Trustees: Isidore B. Dockweiler, Hallack W. Hoag, Ewell D. Moore, Julius V. Patrosso, R. B. Bidwell, Pomona Valley Bar Association, I. Blair Evans, Pasadena Bar Association.

Holdover Trustees: George W. Breslin, J. C. Macfarland, C. E. McDowell, I. W. Robinson, James E. Pawsen, Long Beach Bar Association Richard K. Gandy, Santa Monica Bar Association.

are finally getting our house in order. I might also state that this is the first year for several years that the members of the Board of Trustees have not had to contribute personally to make up deficits occasioned by plebiscites, Hi-Jinks, or some other activity, and certainly no member wants this condition to exist. We all want our Association to pay its own way.

We must have sufficient margin to cover the unusual but desirable or necessary activities. We must be able to have funds with which to participate in the extra-ordinary activities, such as plebiscites and legislative programs. Even with the increased dues, it was necessary, in one of the plebiscites this year, to raise the funds to carry on the plebiscite by voluntary contribution among the members.

MEETINGS

There have been during the current year, 42 meetings of the Board of Trustees, at which there was an average attendance of 14 members.

There were during the year, 35 regular committees, functioning, in addition to special committees appointed from time to time, as well as committees of the Junior Barristers and the Junior Women's section. On the 35 regular committees 283 members acted. Committees in the aggregate had a total of approximately 200 meetings, at which serious consideration was given to the various problems affecting the welfare of the bench and bar, and furthering the administration of justice.

We are grateful that so many men of the profession have been willing to give so freely of their time and abilities to carry on the business of the Association.

ADMINISTRATION

I doubt if all members of the Association realize the ordinary conduct of its affairs constitutes a business. Our Treasurer's report discloses a total income for the current year of $18,055.87, all of which has been administered and expended after due and careful deliberation by the Board of Trustees and officers. All funds expended are carefully audited by the auditing committee.

We are indeed fortunate to have so able, conscientious and efficient an Executive Secretary as Louis Elkins, who in conjunction with our lovable Treasurer, Tom Robinson, and the Finance Committee, have been most efficient and able "watch dogs" of our Treasury.

The scope of the activities of the Board of Trustees and officers is broad and varied. We are repeatedly requested, both by members and laymen to participate actively in all sorts and manner of things. The past year was no exception, and while many requests were made for us to sponsor certain activities that applied to our responsibilities as citizens, they were wholly outside the proper scope of activities of this Association.

ACTIVITIES

In order that the members may have an idea of some of the activities which we did carry on, and which properly come within the Articles and By-Laws of this Association, I would like to point out a few of them:

1. Under the able leadership of Harry McClean, as chairman of the Committee on Semi-monthly Luncheon Meetings, there have been 23 luncheon meetings held, at which the average attendance was 60. These luncheons have proven to be very helpful in that the topics discussed are current topics of interest to our profession, and there has always been a speaker of prominence, a specialist on the topic under discussion.

2. We have had a committee, headed by Sidney A. Cherniss as chairman, which has had charge of giving a series of radio broadcasts. During the year an address was given by a member of the Association each Saturday evening at 6:45 o'clock p. m., and the Association office has had many letters of commendation from citizens of the community, commenting upon the instructive and interesting talks given.

3. The Association also has sponsored a series of lectures at the Los Angeles Public Library, an activity that we have carried on for several years. The lectures are given during the spring of the year. The series consists generally of six or seven lectures at which laymen attend free of charge, and the average attendance in the last year has been approximately 275.

4. Under the able guidance of Trustee J. C. Macfarland, sometimes known as "Dean" Macfarland, the Committee on Post Graduate Law Course was initiated, and there is now being conducted a series of lectures.

The Committee has arranged a general course for the younger practitioners, and a specialized course for the more experienced lawyers.

The general course for the younger lawyers consists of fifteen lectures, which commenced February 10th. The specialized course consists of a group of four lectures, the first of which was a series of lectures on corporate procedure under State and Federal Acts, relating to issuance and public offering of securities.

It is most gratifying that there have already enrolled in the specialized course, over 150, and in the general course well over 200. The interest aroused in these courses is not only local but national, and I believe that once more the Los Angeles Bar Association is pioneering and that other Associations equipped to do so will follow our lead. It is indeed gratifying that so many able and experienced men have consented to conduct these courses. It takes a lot of their time, and we are all deeply grateful that they are sufficiently interested to be so generous with their abilities and experience.

5. We have a special continuing committee on Parole, of which the Honorable Judge Thomas L. Ambrose is chairman. On two different occasions this committee has sent men to our state prisons to investigate conditions, and has proposed that one of the monthly meetings be devoted to a discussion of this very vital and ever present question.

6. We have a continuing committee on Selection of Judges, whose purpose it is to study the present method of selection, disseminate information about methods used in other countries and to report to the membership. I am sure that much can be done if we will but be patient and educate the people of the necessity of improving our present method of selection of judges.

I must reiterate what I stated to the meeting when I was inducted into office—that we can only get the best qualified men to occupy positions on the bench when their tenure of office is consistent with the position they fill, and the remuneration paid them is worthy of the position. My personal opinion is that it should be a life tenure, subject to removal under proper circumstances. Such tenure, with adequate compensation would, in my opinion, remove our Superior Court judges from the embarrassing political hot-bed that they continually occupy. It is to be regretted that so many influences seem to be at work in an attempt to exercise control over our judges.

7. The Golf Committee has been very active this year and has arranged under its hard working chairman, Floyd Sisk, a monthly tournament followed by a dinner and evening of recreation. These tournaments have been selfsupporting, as have the dinners, and there has been an average of approximately 38 golfers to participate in each tournament, and an approximate average of 25 who

have enjoyed the dinners after the tournament and participated in bridge and other better known and more popular games.

8. We have had continuous negotiations with the Governor of the State of California, requesting the opportunity of assisting him in his selection of judges to fill vacancies on our Superior Court; continuous, because they started in the latter part of 1936 and terminated when the recent appointments were made;—terminated only as to the vacancies existing, for through the efforts of our Association, the State Bar Convention and the Board of Governors of the State Bar passed resolutions requesting the Governor to make appointments to fill vacancies from among the candidates receiving the highest votes in a plebiscite to be taken among the State Bar members of the county or city in which is located the court on which the vacancy exists.

9. We have a most excellent and active committee known as the Judicial Independence Committee that is studying the problem of constructive contempt in relation to the apparent inclination on the part of many individuals, groups or interests, to bring pressure to bear on our courts. We have had too much of it of late. Threats are made in public discussion, over the radio, through the newspapers and otherwise in relation to pending litigation, with no other possible motive except for the purpose of creating mass public opinion.

The scope of this committee is broad. Its activities are divided among various sub-committees, and an earnest effort is being made to bring about a realization on the part of the newspapers, the radio broadcasting stations, laymen and the individual lawyers, that such practices and influences are bound to re-

sult in a tearing down of our judicial system. As was aptly said in the article appearing in the February issue of the State Bar Journal on the subject:

> "If lawyers who should know what constructive contempt is, do not practice and maintain respect for the courts, what can they ask or expect of laymen?"

Much of our difficulty I am sure, upon reflection, can be traced back to a thoughtless or indifferent attitude on the part of some member or members of our own profession.

We are studying the proposition, and have been in constant touch with the courts as to the pernicious habit of permitting photographs to be taken either during sessions of court, or during a recess, but under such circumstances that the layman is bound to believe that such photographs were taken during trial. That such practice impedes the orderly progress of trials, tends to introduce an extraneous element which interferes therewith, and often embarrasses and humiliates witnesses and others connected with the trial, appeals to me as being self evident. I am happy to report satisfactory progress in this regard.

It is gratifying that each committee dealing with subjects of such importance is meeting with cooperation in most respects, and we are hopeful that all parties involved will realize that the Association, through its spokesmen, are working for an unselfish purpose—one of the express purposes which our Constitution sets forth, to-wit, to further the administration of justice.

HONORABLE MOTIVES

May I here observe that there has been no action taken by the Association, within my knowledge, at least, and this is the ninth year of my service on the Board of Trustees, or as an officer, but what the ultimate motive was a just and honorable one, an unselfish one, and at the time at least, appealed to the Board of Trustees and the officers as that which was best for all: for the bench, the bar and the community.

We are a non-political Association, striving earnestly and unselfishly to better the conditions of our profession, to advance the science of jurisprudence, and to improve the administration of justice, and it seems to me that it would help tremendously if we would all remember this in measuring and weighing the acts of your Trustees and officers, and of your various committeemen.

There have been many other activities, the details of which I will not undertake to set forth; these include the following: attempting to arrange quarters for the Circuit Court of Appeals pending the completion of the new Federal Building; studying, digesting and acting upon proposed legislation; participating by and through a large and active delegation in the State Bar Conventions; arbitrating through our Arbitration Committee controversies involving attorneys; studying and making recommendations in reference to the Juvenile Court; passing upon matters involving legal ethics; furnishing members to assist in giveng civil service examinations; furnishing speakers for numerous and sundry meetings of other organizations, and endeavoring to spread a better understanding of our profession, and of the purposes of the Association. In other words, we have engaged in a public relations activity. All of these things and many more are essential and necessary activities of the Association. Each activity necessitates the giving of time and ability on the part of several members of the profession, and, without exception, members, when called upon, have given freely and unselfishly.

PUBLIC RELATIONS

I am not unmindful that I promised the Association at the beginning of my year, to recommend the appointment of a Public Relations Committee, and that as yet no such committee bearing that specific title has been appointed. However,

I am happy to state that throughout the year our activities have been so conducted that the purpose of such a committee has been accomplished. We have enjoyed becoming better acquainted with the leaders of numerous civic organizations at our monthly meetings, and your representatives have, in reciprocal meetings, attended numerous functions. Through it all, I believe the community has a better understanding of our Association, what it stands for and what it is attempting to accomplish.

It has been most gratifying that we have on several occasions been able to work hand in hand and in thorough accord and understanding with the Board of Governors of the State Bar, and that on the occasions when requested, the Bar Associations of other counties have cooperated with us wholeheartedly and completely.

I hope that the foregoing has given each member some little conception of the activities of the Association throughout the year. Before closing, I cannot resist reiterating my convictions previously voiced at various meetings of the Association, that in these trying and troublesome times we must of necessity, take a more active part, both as an Association and as individual lawyers, in civic affairs.

TRYING TIMES

We are indeed passing through most trying times. Many honest, sincere citizens believe that affairs have reached a crisis, in that our historic form of government, if not threatened, is being undermined. Certain it is that we as lawyers should be most watchful of any process which will ultimately establish a bureaucratic form of government, for under a bureaucracy the scope of the practice enjoyed by our predecessors in the legal profession will be encroached upon and the fields of our activities will be narrowed. Experience does not lead one to believe that the rights and liberties of our citizens are enhanced by political bureaus.

Many Bills have been proposed in our Congress at Washington which, if passed, are bound to change our whole conception and theory of government. By way of example I suggest that you examine Senate Bill No. 3072 or Senate Bill No. 3331. I have no quarrel with any one who, after considering the facts, decides upon a course of conduct which he sincerely believes to be proper. If the citizens of this country wish to change our form of government after due and deliberate consideration, I do not quarrel with them. My quarrel however, is with the individual who follows leadership blindly without exercising his prerogative of independent thought and calculation, who is for or against some measure without attempting to understand its consequences. I am firmly convinced that our profession should furnish leadership to the community in this regard. Those of us in our profession who stand for the established principles of our Constitution in the face of political emergency, have an opportunity to render to the citizens of our respective communities the leadership for which our profession has always been noted.

In my humble opinion, the historians of the future in recording the events of the next few years, will record a story of which we may be proud if we will accept the responsibility and, more important still, avail ourselves of the opportunity, which is ours. This can be done best, in my opinion, through an aggressive alert, militant, non-political Association such as ours.

Let us all put our shoulders to the wheel and assist the incoming officers and Board of Trustees in their efforts on our behalf.

LOYD WRIGHT,
President.

CONSTRUCTIVE CONTEMPT OF COURT

This Article Was Prepared by the Judicial Independence Committee of the Los Angeles Bar Association

EFFORTS to destroy the independence of our judiciary must be repulsed. An independent judiciary is absolutely essential to the existence of our democratic form of government. The judiciary must be kept free from every form of influence, coercion or outside pressure, political or otherwise. To maintain its independence and integrity in the impartial administration of justice, the judiciary is entitled to the sustaining strength of the bar and the public. To the extent the judiciary becomes subservient to the desire for public popularity, or to the service of particular groups or interests, it loses its independence, to the detriment of the public welfare.

In this community there is an increasing inclination, if, indeed, it is not a definite purpose, on the part of many individuals, groups, or interests to bring pressure to bear upon our courts, designed to influence the outcome of *pending litigation*. This "pressure" takes a variety of forms. It may be, and often is, characterized by threats, openly or covertly made, in the form of public discussion, by radio, newspapers, or otherwise, on pending litigation for the purpose of creating mass public opinion; by ridiculing the social or legal philosophy of the judge; by abuse, or intimidation, or by flattery, or praise or other methods equally reprehensible and illegal. All of which definitely tends to obstruct the ends of justice, influence decisions, and lessen the effectiveness of the courts in the discharge of its sworn duty and constitutes a grave problem, demanding serious consideration by the bar and the law-abiding public.

Such efforts to influence courts in connection with pending litigation, by whomever committed, constitute constructive contempt of court and are illegal acts which are punishable by fine and imprisonment.

The Los Angeles Bar Association, mindful of its duty to the public, and in keeping with its avowed purpose—to promote and advance the administration of justice—has appointed a special standing committee to combat these pernicious practices.

It is the intention of this committe to aid in maintaining the independence and integrity of our courts by all legal means.

The committee proposes to proceed, so far as possible, through conference and friendly cooperation, but if such means fail of results, it intends to prosecute those guilty of committing constructive contempts, regardless of the persons or interests involved.

The Los Angeles Bar Association invites the cooperation of the public, labor organizations and employers' groups, the press, the radio stations, civic or commercial bodies, and the bar in this effort to maintain the independence of our judiciary.

The committee believes that a better understanding of what constitutes constructive contempt and the legal consequences thereof will tend in large measure to eliminate the present abuses.

GENERAL STATEMENT OF LAW

A court has the inherent right to punish as a contempt any act tending to impede, embarrass or obstruct the court in the performance of its functions. (*In re Shuler,* 210 Cal. 377, 292 Pac. 481 (1930).) A contempt "committed in the immediate view and presence of the court," or of the judge at chambers, is a *direct* contempt. (Code Civ. Proc. Sec. 1211.) All other contempts are *constructive.* (*Lapique v. Superior Court,* 68 Cal. App. 407, 229 Pac. 1010 (1924).) A contempt proceeding has as its purpose the punishment of interference with the orderly administration of justice and not punishment for the publication of libelous matter. (*In re Lindsley,* 75 Cal. App. 122, 141 Pac. 934 (1915).) The concept of what constitutes a constructive contempt seems to be one not generally appreciated by laymen. Hence it sometimes happens that through the medium of a newspaper or a radio station contemptuous matter finds expression. The legal profession itself is not entirely innocent of such conduct.

NEWSPAPERS

Legal disputes—civil or criminal—should be decided in court upon evidence there presented and arguments there made. It is essential that courts be not influenced by outside forces and that there be no suspicion of such improper influence. Otherwise a party "will not know whether an adverse decision is the voice of the law or an echo of the mob." (*State v. Bee Publishing Co.,* 60 Neb. 282, 83 N. W. 204 (1900).) A newspaper has a right and a duty to print the news. News is fresh information concerning something that has recently hap-

pened. (*Herald—Republican Publ. Co. v. Lewis,* 42 Utah 188, 129 Pac. 624 (1913).)

An article should not express an opinion as to the merits of the pending case nor reflect upon the parties thereto nor be of such nature as to intimidate or influence witnesses. (*State v. Howell,* 80 Conn. 668, 69 A. 1057 (1908).) While a fair report of court proceedings is proper, statements as to evidence that is expected to be offered, or as to the popularity or prominence of the deceased for whose death the defendant is on trial, or as to inadmissible evidence, are not proper. (*Herald—Republican Pub. Co. v. Lewis, supra.*)

As to criminal cases in particular much improper comment is made. A newspaper should not be the forum of a pre-trial whether the prosecution or the defendant be favored. Thus, where a prosecution for murder is pending, it would be contemptuous to publish facsimiles of a specimen of the handwriting of the accused and of a paper found near the body of the deceased person, and then to proceed to analyze the similarity or lack of similarity of the handwriting, setting forth the views of experts hired by the prosecution. Even if such an article is true, it is an outrageous interference with the administration of justice. (*Globe Newspaper Co. v. Commonwealth,* 188 Mass. 449, 74 N. E. 682 (1905).) It leads to the forming of opinions by the public making it difficult to find qualified jurors.

Likewise contemptuous is the publication of statements relating to a pending case attacking the district attorney, impugning his motives and questioning the character and veracity of prosecution witnesses. (*Lindsley v. Superior Court,* 76 Cal. App. 419, 245 Pac. 212 (1926).) Such publication tends to prevent a fair and unbiased judicial investigation. (*In re Lindsley, supra.*)

An attempt to influence a court as to a pending case by articles designed to prevent one judge from taking part in the decision or threatening judges with certain consequences if a particular decision is made is a constructive contempt. Improper arguments and reasons which counsel could not offer cannot thus be indirectly presented to the court. (*State v. Bee Publishing Co., supra.*)

To charge a judge, as to litigation still pending, with corruption in his manner of handling the case constitutes contempt since such charges tend to intimidate or improperly influence a judge who may be sensitive to public feeling. (*Ex parte Barry,* 85 Cal. 603, 25 Pac. 256 (1890).) On the other hand, an agressive judge might be influenced to take a position contrary to that suggested—an equally great evil.

Where a case is still pending undecided, a newspaper commits a contempt if it publishes an article to the effect that the court has decided the case in a particular way and that the newspaper has ascertained that "from confidential and authoritative sources." Such publication of a false or grossly inaccurate report cannot be justified by attempting to show a good motive or intent. Indeed, it constitutes a misdemeanor as well as a contempt. (Pen. Code Sec. 166.) Distrust and suspicion of the court may thus be created in the public mind and the court embarrassed in its proceedings in the pending case. (*In re San Francisco Chronicle,* 1 Cal. (2d) 630, 36 Pac. (2d) 369 (1934).)

The form of newspaper contempt may consist of editorial comment (*McDougall v. Sheridan,* 23 Ida. 191, 128 Pac. 934 (1913); *State v. Lovell,* 117 Neb. 710, 222 N. W. 625 (1929)) or cartoons (see *Briggs v. Superior Court,* 211 Cal. 619, 297 Pac. 3 (1931)) as well as of statements in the form of articles. Moreover, undue praise or flattery may amount to contempt since it may tend to improperly influence a court. (See *State v. New Mexican Printing Co.,* 25 N. M. 102, 177 Pac. 751 (1918).)

While there is some authority to the effect that it is contempt to scandalize a court of record by a newspaper publication concerning a case no longer pending (*State v. Hildreth*, 82 Vt. 382, 74 A. 71 (1909); see *Note*, 24 *Cal. L. Rev.* 114 (1935)), the prevailing view is that comment and criticism is proper as to a case no longer pending. (See *State v. American-News Co.*, 266 N. W. 827 (S. D. 1936); *In re Shuler, supra*). In this connection, a case is still pending before an appellate court as long as the period during which a rehearing may be granted has not expired. (*In re Nelson*, 103 Mont. 43, 60 Pac. (2d) 365 (1936); *McDougall v. Sheridan, supra; People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912 (1906).) Thus, a contempt would occur if the appellate court is charged with having been influenced by corrupt motives in deciding a case still pending for rehearing and it is further asserted that such influence will have force in the final disposition. (*People v. News-Times Pub. Co., supra.*)

Some courts view as contempts abusive criticism of decisions in cases no longer pending where cases of the same nature are likely frequently to arise. Much can be said for this view since such cases of the same type being likely to come before the court frequently are thus in effect the subject of improper influence. (Of. *State v. American-News Co., supra*, at 833.)

It is immaterial that the contemptuous conduct has had no influence upon the court. (*In re San Francisco Chronicle, supra; In re Shuler, supra.*) That an article was not read by the trial court or jurors does not render a contempt harmless. Witnesses may be influenced or intimidated by the publication and a prejudical atmosphere generally created which will even reach the courtroom. (*State v. Howell, supra*). Everyone is familiar with the tense atmosphere in which many cases have been tried in the past—a situation not conducive to the calm and dispassionate administration of justice.

The intent with which the publication was made is immaterial, except in mitigation. (*In re San Francisco Chronicle, supra; State v. Howell, supra; Globe Newspaper Co. v. Commonwealth, supra.*) Nor is the truth of the publication a defense. (*In re Shuler, supra; People v. News-Times Publ. Co., supra.*) The improper influence still remains. Cases are to be tried *in court* in accordance with orderly procedure.

It is the duty of a newspaper management to exercise proper editorial supervision so as to avoid the slightest tract of contempt. (See *In re Independent Publishing Co.*, 240 Fed. 849. (C. C. A. 9th, 1917); of. *In re San Francisco Chronicle, supra*). "Liberty of the press must not be confounded with mere license. Liberty of the press stops where a further exercise would invade the rights of others. This provision of the constitution does not authorize a usurpation of the functions of the courts. Under the plea of the liberty of the press a newspaper has no right to assail litigants during the progress of a trial, intimidate witnesses, dictate verdicts or judgments, or spread before juries its opinion of the merits of cases which are on trial. As stated before, what may be spoken may be written, and the converse of the proposition is true that what may not be spoken under such circumstances may not be written." (*In re Shortridge*, 99 Cal. 526, 34 Pac. 227 (1893).) "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury, and the publication may affect their judgment. Judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied." (Mr. Justice Holmes in *Patterson v. Colorado*, 205 U. S. 454 (1907).) "A public-spirited and intelligent press in close cooperation with the courts could eliminate the evils of trial by newspaper and render unnecessary to a large extent the use of the contempt power." (Note, 24 Cal. L. Rev. 114, 122 (1935).)

THE RADIO

The same considerations that apply to newspaper publications likewise apply to radio broadcasting. Only the medium of communication is different. A contemptuous statement over the radio by an accomplished orator may cause untold harm in impeding, preventing or obstructing the administration of justice. A radio speaker must not attempt to influence pending litigation or to coerce particular action on the part of a court. (*In re Shuler, supra.*)

A particularly alarming practice is the radio dramatization of a pending legal matter or proceeding. Such dramatization of necessity cannot be a fair news report since the very nature of such broadcast involves an attempt to reach a certain emotional result. Dramatic effect, not the mere reporting of a current event, is the object in view.

*For the purpose of regulating interstate and foreign commerce by wire and radio, the Communications Act of 1934 (U. S. C. A. Title 47, 1937 Supp.) was passed. Section 315 of the Act, relating to the matter of radio stations making their facilities available to candidates for public office, is as follows:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make

**The matter between * and ** was not included in the article printed in the State Bar Journal for February.*

rules and regulations to carry this provision into effect; *Provided*, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."

It will be noted that the section quoted directs the Federal Communications Commission to make rules and regulations designed to carry the provisions of said section into effect. A communication from the Commission indicates that as late as March 30, 1937, the Commission had made only one rule under said section. That rule, known as Federal Communications Commission Rule 178, merely incorporates the section as above quoted, preceded by the words: "attention is directed to Section 315 of the Communications Act of 1934, which reads as follows:" and then, after repeating the section, ends with the following section:

"Any violation of this section of the Act shall be sufficient grounds for the revocation or denial of a broadcast license."

In response to an inquiry from a firm of attorneys representing a local broadcasting corporation, the Federal Communications Commission, by John B. Reynolds, Acting Secretary, under date of March 30, 1937, wrote as follows:

"Rule 178, a copy of which is enclosed, is the only rule which has been promulgated pursuant to Section 315. Section 315 as well as Rule 178 concerns legally qualified condidates for public office and not political parties, or persons speaking on behalf of such candidates.

"In answer to your inquiry as to whether a station may censor the material broadcast under the provisions of this Section, you are advised that the Commission has not had occasion to pass upon this question. However, in passing upon the interpretation of Section 18 of the Radio Act of 1927, of which Section 315 is a reenactment, the Supreme Court of Nebraska, in the case of *Sorensen v. Wood*, 243 N. W. 82, held the provision that a licensee 'shall have no power of censorship over the material broadcast under the provisions of this section' was not intended to authorize or sanction the publication of libel and adopted the theory that the prohibition of censorship of material broadcast over the radio station of any licensee merely prevents such licensee from censoring the words as to their *political and partisan trend*, but does not give a licensee any privilege to join and assist in the publication of a libel nor grant any immunity from the consequences of such action. It was held further that the speaker and the owner of the broadcast station might be sued together for damages resulting from their acts."

The matter of *Sorensen v. Wood and K. F. A. B. Broadcasting Company*, (1932) 243 N. W. 82 (Neb.) was an action for damages for libel by Sorensen, candidate for the office of Attorney General of Nebraska against the two defendants above named, one of them a speaker, and the other, the operator of radio station K. F. A. B. With reference to the defense of the defendant company that the words used by the speaker over its station were privileged under Section 315 of the Communications Act of 1934, the Supreme Court of Nebraska said:

"The plea of defendant company that the words used by Wood were privileged appears to be based upon the theory that Wood's speech could not be censored because made on behalf of Stebbins, a candidate for senator, who had to be granted the right to speak or to have a speech made favoring his candidacy Senator Norris having previously spoken over the same station in promotion of his own candidacy. The argument on which this theory is based is sought to be derived from Section 18 of

the Radio Act of 1927 (44 St. at Large, 1170 (47 U. S. C. A. Sec. 98)) and from order No. 31 of the Federal Radio Commission, dated May 11, 1928, reproducing the section providing that, when equal opportunity is granted to legally qualified candidates for public office to use a broadcasting station, the 'licensee shall have no power of censorship over the material broadcast under the provisions of this section.' We do not think Congress intended by this language in the Radio Act to authorize or sanction the publication of libel and thus to raise an issue with the federal constitutional provisions prohibiting the taking of property without due process or without payment of just compensation. Const. Fifth Amendment. This is particularly true where any argument for exercise of the police power and for any public benefit to be derived would seem to be against such an interpretation rather than to be served by it. So far as we can discover, no court has adjudicated this phase of the statute and order. We reject the theory. For the purposes of this case we adopt an interpretation that seems in accord with the intent of Congress and of the Radio Commission. We are of the opinion that the prohibition of censorship of material broadcast over the radio station of a licensee *merely prevents the licensee from censoring the words as to their political and partisan trend but does not give a licensee any privilege to join and assist in the publication of a libel nor grant any immunity from the consequences of such action. The Federal Radio Act confers no privilege to broadcasting stations to publish defamatory utterances.*" (Italics ours.)

* * * * * * * * * * *

"The fundamental principles of the law involved in publication by a newspaper and by a radio station seem to be alike. There is no legal reason why one should be favored over another, nor why a broadcasting station should be granted special favors as against one who may be a victim of a libelous publication." **

ATTORNEYS

There is a tendency on the part of some attorneys to have a pre-view of pending litigation in the newspapers—a pre-view that will often bear little resemblance to the litigation when the matter comes on before the court for trial or hearing on the merits. An attorney who participates in a contemptuous publication is himself guilty of contempt. (See *In re Ries*, 101 N. J. Eq. 315, 138 A. 586 (1927).) Moreover, he thereby violates canon 20 of the Canons of Professional Ethics of the American Bar Association:

> "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement."

A lawyer is under a duty "to maintain the respect due to the courts of justice and judicial officers." (Code Civ. Proc. Sec. 282.) Thus an attorney is guilty of contempt if he authorizes the publication in newspapers of an interview in which he predicts that a court will act in a particular way in a pending case because of reasons having no connection with the merits of the pending case. (*State v. Kirby*, 36 S. D. 188, 154 N. W. 284 (1915).) In fact, a person may be held in contempt because of a newspaper publication of his improper statements if the statements are made for publication, even though the publica-

tion was not expressly requested or express consent therefor given. (*In re Simmons,* 248 Mich. 297, 226 N. W. 907 (1929).)

A vicious practice is the calling in of reporters by an attorney for the purpose of obtaining publication of statements designed to influence, or having the effect of influencing, the disposition of a pending matter. Thus it is misconduct to so give statements to reporters, after a trial court has announced its decision but before findings are signed, charging the judge with malfeasance and incompetency for the purpose of influencing or discrediting the action of the judge. (*In re Collins,* 147 Cal. 8, 81 Pac. 220 (1905).)

Moreover, a letter written by one attorney to another—even though not intended to be made public—falsely imputing improper conduct to judges in a pending matter, and tending to give rise to the untrue impression of undue intimacy with certain parties, is contemptuous. (*Matter of Shay,* 160 Cal. 399, 117 Pac. 422 (1911).)

Attorneys, above all, should refrain from trying their cases anywhere but in court. Newspaper statements fostered by attorneys and calculated to intimidate witnesses or create a public opinion favorable to one side should be carefully avoided. Cases are to be tried in court subject to the rules of evidence, not in the newspapers where no rules of evidence govern and where legally-inadmissable evidence and non-existent "facts" may find the most ready public acceptance. If lawyers, who should know what constructive contempt is, do not practice and maintain respect for the courts, what can they ask or expect of laymen?

LAW COURSE FOR LAWYERS A SUCCESS

THE ambitious educational program sponsored, and now being carried on by the Los Angeles Bar Association, available to all lawyers of the county, has thus far proved most successful. The attendance at the lectures, held at Porter Hall, University of Southern California, has been most encouraging, and no doubt will increase as the excellence of the course becomes more widely known to lawyers.

The opening lecture of the spcialized course, by Paul Fussell dealing with changes in California statutes since 1929, with reference to corporations, was attended by 142 lawyers, and his second lecture on the same subject on February 15th, by a like number. Both were extremely well prepared and interestingly delivered. The lawyers seemed to look back to class room days and gave very close attention to the speaker. In fact, this is true of all the audiences.

The first lecture of the general course, primarily designed for the younger practitioners, by Justice Marshall F. McComb, of the District Court of Appeal, on February 10, was attended by 215 lawyers, old and young. His subject was "appeals to the Supreme Court and District Courts of Appeal." It was exhaustively treated and highly instructive.

Perhaps it is natural that the subject of the second lecture of the general course, on the "Preparations for Trial," would attract wide attention. At any rate, 225 lawyers attended on February 17, to hear Allen W. Ashburn discuss this interesting and universally popular phase of law practice. Mr. Ashburn, recognized as a trial lawyer of wide experience, and a pleasing speaker, held the earnest attention of his audience for two hours with his most instructive talk. The appeal to the practicing lawyers was evidenced by the number who take notes of the many practical suggestions offered by the speaker.

Other lectures will follow weekly during the months of March, April and May.

FORM OF BEQUEST

I give, devise and bequeath unto ***The Los Angeles Bar Association*** *of Los Angeles, California*_____

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(Above insert the amount of money bequeathed, or a description either of specific personal property, or both, given, or if it be the residue of an estate, state that fact.)

REPORT ON PROCEDURE IN REORGANIZATION PROCEEDINGS UNDER SECTION 77B OF THE BANKRUPTCY ACT, AND RECOMMENDATION FOR THE ADOPTION OF A RULE BY THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, APPLICABLE TO SUCH PROCEEDINGS.

Note: This report of the Special Committee of the Los Angeles Bar Association has been approved by the Board of Trustees and submitted to the Judges of the United States District Court for the Southern District of California, but the proposed rule has not been adopted, by the court. The report is published for the information of members of the Bar.

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1. **IN GENERAL:**

The undersigned have been appointed as a Committee by the Los Angeles Bar Association to make a study of the existing procedure in reorganizations under 77B of the Bankruptcy Act, to render a report thereon and to make such recommendations, if any, as may seem desirable or appropriate to facilitate the accomplishment of such reorganizations in a manner most beneficial to security holders and creditors.

The passage of the 77B Statute marked an important development in the machinery of reorganization of financially distressed corporations, and we believe that there are few persons qualified to speak who will dispute the fact that this development has proven to be a beneficial one. Eloquent evidence that the 77B Statute is so regarded is the fact that since its enactment the procedure provided thereby has been utilized almost exclusively for purposes of reorganization, and the old method, involving an equity receivership and judicial sales, has been almost entirely abandoned. However, experience has shown that the existing procedure under the 77B Statute can be improved upon.

Before embarking on the task assigned to it, it was necessary for the Committee to determine the extent of study required in order for it to do its work intelligently. It was obvious that it was entirely impractical for the Committee, itself, to make a detailed investigation of the facts and circumstances surrounding any substantial number of individual reorganizations. Fortunately, a comprehensive study of this character has been made recently, and was available to the Committee. This study to which we refer is Parts I and II of the "Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees," which the Securities and Exchange Commission transmitted to both Houses of Congress this year. The Committee has studied the Commission's Report, and feels that such study is, for reasons which will hereinafter appear, an entirely sufficient basis upon which to predicate this report.

The Report of the Commission, after making an exhaustive study of a number of large reorganizations, points out the opportunity for certain evils and abuses under the existing process of reorganization. Some of these evils and abuses can only be corrected by Acts of Congress, and with these this report is obviously not concerned. Others, in our opinion might be avoided or minimized by the adoption of Rules of Court, and it is to such abuses and the practicability of any regulatory rule or rules in respect thereof that we shall address ourselves.

In our study of the Commission's Report it has not been necessary for us to determine whether, as a factual matter, the criticisms of the Commission of practices in the particular reorganizations investigated by it are in every instance sound. The illuminating feature of the Commission's Report for the purpose of this report is that it clearly points out certain phases of reorganization procedure in 77B proceedings in which the *opportunity* for abuses exists, and it is the elimination of the *opportunity* for abuses with which we are concerned.

The Securities Act of 1933 and the Securities Exchange Act of 1934 were enacted primarily, if indeed not solely, for the protection of purchasers of securities, and the Securities and Exchange Commission is the administrative body charged under both Acts with the duty of such protection. Criticisms by that body of existing or potential abuses in the present 77B procedure originate from and are motivated by the desire to fulfil that duty. Therefore, any steps that the Bench and the Bar can take which will have the effect of eliminating or diminishing the evils, real or potential, which are the subject of such criticisms should be of benefit to the investing public.

We desire to emphasize at this point that reorganization proceedings under the 77B Statute fall into that limited class of proceedings which involve not only legal procedure and judicial action, but also business problems which are frequently of great complexity, such as (a) the operating problems of the business of the debtor as a going concern, (b) the evaluation of the properties as a whole and of the respective interests of the various classes of security holders therein, (c) the evaluation of the services of laymen in handling the business problems, and (d) the formulation of a practical plan of reorganization which frequently includes the working out of a plan of new financing and a program for the future of the business.

Such business problems can usually be solved only by negotiations and contracts between the interested parties, but such solution is nugatory unless it is approved by the District Judge. In many cases the negotiations between the different interests leading up to the agreement upon a plan are long and difficult and in most cases the result of a compromise. The interested parties cannot force the Judge to approve their solution of these business problems, and, conversely, the Judge cannot compel the interested parties to accept his solution. It is felt that, on the one hand, the Judge should have some familiarity with the progress of the negotiations and with the parties who are negotiating prior to a plan being brought to him for final approval. On the other hand, the persons

who are giving their time and energy to help solve the business problems involved should have some intimation in advance whether the Judge has objections to the plan to be proposed or to the amount of expense to be incurred in connection therewith, and also whether their services will be recognized by the Judge as such as to entitle them to compensation.

It is asking too much of the Judge to expect that in all cases he will approve business arrangements in which he did not participate and over which he had previous control or supervision. And yet that is exactly what he is frequently asked to do. For example, cases frequently arise in which the interested parties have agreed upon a plan of reorganization and incurred substantial expenses in connection therewith and such plan has been accepted by the required percentage of security holders and creditors, all without the knowledge of the judge and in advance of the time when he is asked to pass upon the fairness of the plan and order its confirmation. The plan may contain provisions objectionable to the Judge, yet, inasmuch as the plan has been accepted by the required percentage, he may be loath to refuse confirmation. He may, and frequently does, confirm a plan containing provisions which he does not favor because he hesitates to substitute his business judgment for that of security holders and their representatives. Likewise, if it is made to appear that representatives of security holders have incurred expenses in good faith for the benefit of all of a class, he may hesitate to disallow them in whole or in part (even though he would not have initially authorized them) where the result of such disallowance would be to saddle them upon depositing security holders only or upon committee members or reorganization managers personally.

If a procedure can be developed whereby the Judge can be kept currently advised of these matters, he can guide the progress of the reorganization and thereby keep a constant check on fees and expenses and, in most cases, be assured that (1) the plan of reorganization which is finally brought before him will be one which he deems fair in all respects and one which he will not hesitate to confirm, and (2) the problem of allowance of fees and expenses will be greatly simplified. Such a procedure should serve to promote the best interests of security holders and creditors and at the same time make prompt and orderly accomplishment of a plan of reorganization easier both for the Court and the interested parties.

Having set forth in a general way the purpose and scope of this report, it may not be amiss to state that at least one court, *i. e.,* the Circuit Court of Appeals for the Second Circuit, has already suggested the efficacy of a Rule of Court to eliminate or minimize one of the more notorious abuses now prevalent in reorganization proceedings under Section 77B. In the case of *In re Paramount Publix Corporation,* 85 Fed. (2d) 588, the appellant, an attorney at law, had applied to the District Court for compensation for services rendered by him "in connection with the proceeding and the plan." The District Court denied his application and he appealed. It appeared that he represented certain security holders and creditors and participated in the reorganization proceedings

on their behalf in the District Court. It also appeared that large groups of security holders and creditors of the same class were already represented in the proceedings. In affirming the ruling of the District Court, the Court (through Augustus N. Hand, J.) said:

> "Before appellant could properly claim an allowance out of the general estate, he ought to have satisfied the court that the stockholders of the debtor, or the creditors of Allied Owners Corporation for whom he appeared, needed as members of a class further representation in connection with the reorganization than that already available to them, and that his services were rendered with the understanding that they were to be made the basis of a claim for compensation out of the general estate. This he failed to do.
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> It is to be noticed that the statutory grant of power to award compensation makes its exercise permissive rather than mandatory, and while, under some circumstances, it might be abuse of discretion to withhold compensation entirely, in our opinion, the making of any award should be guided by those considerations which have always affected courts of equity and bankruptcy in dealing with such matters.
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> The provisions of section 77B (c) (9) are broader than the provisions of the old Bankruptcy Act and the judge-made rules applicable to equity receiverships and clothe the courts with a wide discretion. Their purpose was to make the expenses necessarily incidental to a reorganization payable out of the estate at large. Such a purpose was reasonable, since a reorganization is a rehabilitation for which the debtor or those whom it in fact represents ought to pay. It cannot, however, be doubted that most large estates are besieged by persons claiming to have played some part in liquidating or rehabilitating them, and that if provision is not made to prevent duplication of work and compensation, their administration will be haphazard and largely dependent on the sporadic notions of the particular judge in charge as to

what may vaguely be regarded as equitable. Without some standardization of practice, the broad and useful powers granted by section 77B (c) (9) are likely to produce serious evils of which the flood of applications for high fees in this very case gives warning—a flood fortunately held back by the sound decision of the experienced district judge, though at the expense of much time and labor. Because of the danger of numerous and extravagant allowances, we shall attempt the task of indicating certain methods of administration likely to prove beneficial to estates, and, as we believe, capable of practical operation.

"First of all, we would express our acquiescence in the statement of Judge Coxe that: 'Any creditor or stockholder is entitled as of right to be heard on the question of the permanent appointment of any trustee or trustees, and on the proposed confirmation of any reorganization plan (section 77B (c) (11) (11 U. S. C. A. s 207 (c) (11)). But mere participation in the hearings at which these questions are discussed, or offering advice, suggestions, or criticisms regarding the proposed plan, or on matters of procedure, does not give rise to any claim for compensation from the estate. These are services for which attorneys should look to their own clients for payment.' *In re* Paramount-Publix Corporation (D. C.) 12 F. Suppl. 823, 828, 829.

"In addition to the limitations of allowances under the foregoing 'de minimis' rule, we think that in order to prevent duplication there should be no award to any person or committee where an efficient, honest committee for the same class of creditors or stockholders is in the field, unless the court is persuaded of the necessity of additional representation in the interest of a proper reorganization. Accordingly, a committee organized to represent a class of creditors or stockholders may ordinarily be compensated for its services and reimbursed for its expenses 'incurred in connection with the proceeding and the plan' out of the general estate if there is no other committee in action; but ordinarily there is no need of more than one committee if its representation of the class it purports to serve is adequate. If some other committee or person proposes to seek compensation out of the general assets, there should be an application to the court for recognition, preferably in advance of the rendition of the services for which compensation is to be sought. It should show the need of separate representation, and there should be an allowance out of the general estate only where those recognized have performed substantial services 'in connection with the proceeding or plan.' We have used the words 'preferably in advance,' because there may be situations where second committees are acting in pending estates with the tacit approval of the court though without an order recognizing them made upon a formal application. In such cases it might prove an unexpected hardship to require an order in advance of the rendition of services where separate representation is found to have been necessary for proper administration; *but in dealing with future proceedings under section 77B, orders for separate recognition should be obtained before any services are performed, if payment is to be sought from the general estate. * * * While the present decision must serve as a sufficient warning to the profession, a District Court rule dealing with the matter would, we believe, prove advantageous.*" (Italics ours.)

If, as Judge Hand suggests, a rule of court would prove advantageous for the correction of the abuse of unnecessary duplication of services, rules of

court might prove equally advantageous for the correction of other abuses. We shall therefore review and analyze certain practices and activities in reorganization proceedings which, as pointed out by the Report of the Securities and Exchange Commission, permit of abuses.

2. PRELIMINARY APPROVAL OF PLAN BY COURT:

It has already been suggested that where a plan of reorganization has been completed in all its details and accepted by the proper percentage of each class of creditors in accordance with statutory requirements, there is a great pressure upon the District Court to approve the plan as fair, equitable and feasible, although he might feel that, except for its completed status, various modifications should be made therein. There is authority both for and against tentative approval of a plan prior to its submission to creditors and stockholders. There is no provision of Section 77B of the National Bankruptcy Act which purports either to authorize or to disapprove of such a practice. Pre-determination of the plan's validity is a measure of economy, for then consents will not have been secured for a plan which will be finally found defective by the Court. On the other hand, the fact that the Court has indicated its willingness to approve the plan may be influential in securing consents to it

which might not otherwise be given. At least three District Courts have approved of such a preliminary and tentative approval.

In re Long-Bell Lumber Co., Bankruptcy Law Service (C. C. H.) Par. 3607 (U. S. D. C., W. D. Mo., 1935);

In re Prudence Bonds Corp., 16 F. Supp. 324, (U. S. D. C., E. D. N. Y., 1935);

In re Pressed Steel Car Co., of N. Y., 16 F. Supp., 325 (U. S. D. C. W. D. Penna., 1936).

On the other hand, the Circuit Court of Appeals for the First Circuit has disapproved any such tentative approval of a plan by the Court in advance of its being sent out to the creditors and stockholders for their consents.

Downtown Inv. Assn. v. Boston Metropolitan Bldgs. Inc., (C. C. A. 1, 1936), 81 F. (2d) 314.

In the latter case the District Court had orally approved the plan in advance but did not enter a written order of approval until the necessary acceptances by creditors had been filed in court. On appeal the opponents of the plan raised the question of the propriety of such approval of the plan in advance, and the Circuit Court of Appeals said:

> "* * * In some districts plans for reorganization have been presented for the approval of the court in advance of being sent out to creditors and stockholders for their acceptance. While such a procedure may be in the interests of speed and economy, we disapprove of any such practice. While the district judge might be willing and perhaps ought to make known any disapproval he may have of a proposed plan in advance if it contains any such glaring defects as to satisfy him at once that if the plan were accepted he would never confirm it, to go further than this and prejudge a plan in advance is irregular. It would give the proponents of a plan the right to go before creditors and stockholders with the argument that the plan had been approved by the court and thus obtain acceptances which never would have been given. We cannot say, however, in the instant case that the verbal confirmation of May 13, 1935, constituted reversible error because the final decree was not entered until May 27, 1935, the same day on which the summary of acceptances was filed in court."

It seems to the Committee that all of the above mentioned courts are striving for the same thing, to wit, to give the District Court an opportunity to review the plan prior to its submission to creditors without either finally approving or condemning the plan in advance. If the plan and any amendments thereto could be submitted to the Court in advance, the Court could familiarize itself with the development of the plan and at the same time point out to its proponents any glaring deficiencies which would in any event prevent its approval by the Court. At the same time, the Court could make it understood that filing the plan with the Court would in no wise result in an approval or disapproval of the plan until it was finally brought before the court for confirmation with the necessary consents already filed. The Committee does not feel that the present statute leaves room for a Rule of Court requiring such

filing as a condition precedent to having a plan finally approved, but the Committee suggests that it might prove advantageous in many instances for the Courts to encourage the submission of all plans or amendments to plans to the Court sufficiently in advance of their promulgation to permit the Court to examine them. The Committee recommends that if the Court should take any action on a plan or amendment so submitted, the Court should make it clear that by such action it has not finally approved or disapproved the plan, and prohibit any party from publishing any statement or otherwise implying that the Court has voiced such approval or disapproval.

3. THE PERSONNEL, FUNCTIONS AND ACTIVITIES OF COMMITTEES FOR SECURITY HOLDERS AND CREDITORS, AND THEIR COUNSEL:

When a corporation defaults in the payment of any of its obligations, and is unable to cure such default, its security holders and creditors are usually faced with two alternatives, (1) liquidation or (2) reorganization. In some cases the financial condition and business of the company are such that it is either impossible or unwise to attempt reorganization, and in such cases liquidation necessarily ensues. In others the maximum recovery to security holders and creditors can best be obtained by the preservation of the goodwill and going concern value of the company, and in such cases it is obviously to the interest of all concerned to accomplish a reorganization.

Normally, the security holders and creditors of a corporation are numerous and scattered, and the inertia of individual security holders is proverbial. Such inertia is readily understandable. No reorganization can be accomplished without the consent of a large percentage of the security holders, and the individual is unable or unwilling to bear the expense necessarily attendant upon the representation of his class and the obtaining of their consents to a plan. In view of this, a practice has arisen, which has become almost universal, of the formation

of committees to represent the various classes of security holders and creditors of a corporation in financial distress. These committees are almost always self-appointed, and the custom has been that the houses of issue of the securities, feeling a moral obligation to assist the holders of securities they have sold or underwritten, have frequently sponsored these committees. In many instances the membership of such committees has been composed in whole or in part of representatives or nominees of the houses of issue. Sometimes rival committees are organized, but this would seem to be the exception rather than the rule, especially in the case of small companies.

Under the prevailing system, such committees, as pointed out by the Report of the Securities and Exchange Commission, have exercised useful and in many cases indispensable functions. It is appropriate to mention some of these functions:

(1) Corporate mortgages generally provide that the trustee thereunder can only be compelled to take specified action when requested so to do by the holders of a designated percentage (seldom less than 25%) of security holders. Therefore, the mobilization of security holders may be, and frequently is, essential in order to force the trustee to take such action. Such mobilization tends to place the security holders in a strategic position over the debtor and enables them to speak with authority in the controversies which inevitably arise with other security holders.

(2) Security holders, when thus organized, are able to exercise a healthy surveillance over the administration of the estate by the reorganization trustee, if one is appointed, or the debtor, if it is allowed to remain in possession. Committee members or their counsel, speaking for security holders, often carry great weight in the determination of matters of policy and the administration of the estate and kindred matters.

(3) An organized group of security holders is in a position to make a study of the business and affairs of the debtor in a manner calculated to enable it to propose a sound plan of reorganization or to form an intelligent judgment of any plan proposed by others. Such an organized group is also in a position to ascertain whether or not claims exist against the former management, the houses of issue of the debtor's securities, or others, and if such claims are found to exist to prosecute them or bring vigorous pressure upon the reorganization trustee to pursue them.

(4) Every plan of reorganization involves negotiations between the various interested groups, and real or potential controversies always exist as to their rights and entitlements. Before a plan of reorganization can be accomplished, these controversies must be "traded out," point by point. Scattered individual security holders cannot, from a practical standpoint, perform this function. The settlement of these differences can only be accomplished effectively by representatives of the various classes involved after a full study has been made of the underlying facts necessary for intelligent and effective representation, and this

frequently, if, indeed, not generally, involves the employment of accountants, engineers and appraisers, and consultation with counsel.

(5) The committee is a convenient medium of obtaining assents to a plan of reorganization. Conversely, a committee can be useful to security holders in opposing a plan which is unfair to the security holders it represents.

In order to permit a committee to exercise these functions it has been a common and convenient practice for the committee to execute a deposit agreement, to which security holders become parties by depositing their securities with the depositary named therein. Deposit agreements normally give the committee broad powers, one of which is the power to charge the deposited securities with the expense of the committee.

In its Report above referred to, the Securities and Exchange Commission points out several particulars in which, under the existing practice, the broad powers given such committees by deposit agreements are susceptible of abuse to the detriment of the security holders they represent.

We believe it is essential that we set forth the Commission's criticisms of the existing reorganization procedure, in so far as applicable to committees, in sufficient detail to enable us to analyze the practices criticized and to explore the feasibility of the enactment of District Court Rules as a corrective measure.

(1) The Commission recommends that measures should be taken to place the control of reorganization with *bona fide* security holders and their direct representatives, which, of course, is tantamount to a recommendation that in so far as committees are utilized in reorganization, their personnel should be limited to persons who are, or directly represent, *bona fide* security holders. This is undoubtedly desirable but, owing to the inertia of security holders, is not always practicable. Furthermore, even where such persons are available as committee members, they may be inexperienced in corporate finance and it is obvious that a knowledge of corporate finance, if not essential, is at least extremely desirable to obtain the best results for security holders in negotiating a plan of reorganization. Therefore, in some cases it may be desirable for the best interests of security holders that a committee have among its personnel one or more persons skilled in corporate finance and in reorganizations, even though such persons are not security holders or their representatives. In each case the selection of the personnel of a committee will necessarily be influenced by the availability of *bona fide* security holders or their representatives and by the particular facts and circumstances underlying the situation. Therefore, in expressing our complete accord with the recommendation of the Commission in this respect, we do not wish to be understood as expressing the view that in all cases the committee personnel should necessarily be so constituted as to exclude representatives of the original underwriters or of investment banking firms whose customers are holders of a substantial amount of the securities involved.

(2) The Commission recommends, in effect, that no person having or likely to have loyalties that might conflict with the securities represented by the com-

mittee, and in particular that no one who is a part of, associated with or under obligations to the old management of the debtor, nor any member, representative or affiliate of a house of issue of the debtor's securities, should be permitted to serve on a committee representing the debtor's security holders, on the ground that the objectives of such persons are often incompatible with the interests of the security holders they represent. It is obvious that the time-honored rule that a man cannot serve two masters is applicable here, as elsewhere in our jurisprudence. The criticism of the Commission of the old management or the debtor's bankers serving on a committee representing security holders of the debtor is, in a general way and briefly, as follows:

(a) The management of the debtor, *i. e.*, is officers or directors, may be financially liable for acts of omission or commission, or the management, although not legally responsible, may have been faithless or incompetent in exercising its managerial functions, and yet desirous of being retained in the reorganized company, in either of which cases the self-interest of the management is in conflict with the interests of the security holders.

(b) Although houses of issue assert, and in many instances no doubt feel, a moral obligation to protect persons who bought the securities which they sponsored, representatives of a house of issue who serve on a committee for security holders of the debtor are not always motivated exclusively by such consideration, and a conflict between the self-interest of the houses of issue and the best interests of security holders may arise as a result of a variety of circumstances—the extent of the financial interest of the houses of issue in the enterprise, their relationship to the management under whose auspices the company failed, their participation in acts of management of the company for which legal liability may be imposed or as a result of which a new management of the company may be desirable or necessary, fraudulent or negligent activities in connection with the sale of the securities; or if none of the foregoing circumstances are present, from a desire on the part if the underwriters not to be discredited and to "save face," which desire may not be conducive to a thorough-going reorganization.

Such criticism is pertinent, and there is no doubt that persons falling within these categories should not serve upon committees if other persons not having these affiliations, who have the experience, enterprise and ability to serve efficiently the security holders they represent, are available as committee members. As a matter of fact, in view of the Commission's criticism of the practice of nominees of the bankers or of the management serving on committees, we venture the prediction that in the future reputable persons falling within such categories will be hesitant to serve as members of committees representing security holders, when so to do would or might subject them or their motives to criticism. Be that as it may, particular instances may arise in which it might be distinctly advantageous to security holders for one or more of such persons to serve on committees acting in their behalf in 77B proceedings, particularly if the court is satisfied that the extent and character of the conflicting interest would not

prejudice the interests of the investors sought to be served. Any corrective measure that is taken should be sufficiently elastic to cover any set of circumstances that might arise.

(3) The Commission criticizes committees for one class of security holders being composed in whole or in part of individuals who own, represent or otherwise owe an allegiance to another class of securities. This, of course, is but a particular instance of the general criticism that no committee member should serve as such if he has a divided allegiance. We are in entire agreement with this criticism, except that here again any corrective measure used must be of sufficient elasticity to permit such persons to serve if (except for such conflict) they are otherwise desirable representatives and there are no other desirable or as desirable representatives available.

(4) The Commission condemns a procedure which permits committee members to trade for their own account in the securities which they represent or the certificates of deposit therefor. Such practice has also been condemned in a memorandum opinion by Judge Caffey of the District Court for the Southern District of New York in reorganization proceedings under 77B of *Republic Gas Corporation* (Par. 4104 of C. C. H. Bankruptcy Service), and by Judge Coxe in *In re Paramount Publix Corporation,* 12 F. Supp. 823 (S. D. N. Y. 1935), Aff'd. 83 Fed. (2d) 1015 (C. C. A. 2d, 1936). We are thoroughly in accord with the views of the Commission on this subject and with the conclusions of the Court in the decisions mentioned.

(5) The Commission opposes the financing of committees by parties having interests conflicting with those of the security holders represented by the committee. The rationale of this criticism is apparent. We make no comment thereon, because if the procedural changes hereinafter recommended are adopted, committees in most instances will not finance themselves.

(6) The Commission criticizes the employment of any attorney or firm of attorneys with alliances of the same character as those which are objectionable in committee members.

Before attempting to show how a corrective rule of court can be advantageous from a practical standpoint, it will be necessary to comment further upon the subject of deposit agreements and their use by committees. As hereinabove stated, under the existing practice, one of the most important powers usually granted to committees under deposit agreements is the power to charge the deposited securities with the expenses of the committee.

Under the 77B act, all expenses incurred by a Committee are subject to the approval of the Court. When approved they are chargeable to *all* security holders —to those who have not agreed to the plan as well as those who have. Instances have arisen where such expenses have been incurred *without* the Court's knowledge and subsequently its approval has been withheld. In such a situation the committee's position is an unenviable one, and we venture the prediction that unless exceptional circumstances exist, counsel will warn prospective committee

members of the hazards of serving on a committee whose method of operating permits the disallowance of expenses incurred in good faith. Committee members cannot be expected to take such risks. Certainly any fees they may anticipate will be allowed them for their services will not compensate them for the assumption of such risks. While it may be that under the old reorganization procedure in equity the fees of committee members were in some instances large, or even extortionate, this has not been true by and large in the reorganizations recently accomplished under 77B proceedings. We believe it is fair to say, in so far as the reported 77B cases are concerned at least, that it is the exception rather than the rule that a committee member has been awarded a fee that can be described as anything more than a mere honorarium. Therefore, it becomes doubly apparent that if men of character, ability and standing are desirable as members of these committees, they cannot be induced to serve under circumstances where on the one hand they can only look forward to receiving nominal fees, and on the other must run the risk (1) of incurring a personal liability which may run far in excess of any fees that they could hope to receive, or (2) of imposing a liability upon depositing security holders.

What has been said is not to be taken as a criticism of the power of the Court to pass upon the propriety and amount of the expenses and fees of committees. We believe that the existence of such power and its exercise by the courts is a healthy development in reorganization practice, and this observation holds equally true as to counsel fees. But we do desire to emphasize the difficult position of committee members functioning in 77B proceedings under the form of deposit agreement heretofore commonly used, because it leads us to the inevitable conclusion that if deposit agreements are to be used at all in the future in these proceedings, they will rarely be used as a means to finance the committee's activities.

If, then, the practice of charging depositing security holders with the committee's expenses is to be abandoned in most cases, as we believe it must and will be, a procedure must be devised whereby such expenses will be borne by the trust estate. This means, in substance, that since such expenses must be approved by the District Judge, any such procedure must permit the approval of such expenses by the court before they are incurred. While this is a departure from the methods which have been customarily used in the past, and while it may seem at first blush that such a course may be cumbersome, we do not believe that it will involve any practical difficulties if a rule of court is adopted which invites such practice.

When upon the default of an obligation, say a bond issue, a corporation is no longer able to continue its business without reorganization, security holders and creditors become immediately concerned with the company's fate and the protection of their securities and claims. Because of the inertia of individual security holders, hereinabove adverted to, action to unite with the common interest of protecting their rights is rarely, if ever, taken initially by individual holders or creditors. Indeed, experience shows that in a great many, if indeed

not in the great majority of instances, the individual security holders never take such action. However, the houses of issue which have sponsored the debtor's securities become immediately concerned when it is apparent that trouble is brewing.

Under the procedure which we suggest, the houses of issue would no doubt immediately consult with their counsel and determine (1) if it were necessary or advisable to form a committee, and (2) if so, who its members should be. In making this decision, the houses of issue would necessarily review the circumstances surrounding the default, the possibility of any liability devolving upon them as sponsors of the debtor's securities, their connection with the old management, if any, and any implications that could be drawn therefrom, and in short, all factors which might render it undesirable, from the standpoint of security holders, for the bankers' nominees to serve on a committee for the protection of the securities in question. After having made such review, they could then form an intelligent opinion as to whether the committee should have their sponsorship or not. If not, they might nevertheless deem it for the best interests of security holders that they take the initiative (and the initiative must be taken promptly by *someone* if the best is to be accomplishd for security holders) in seeking out *independent* security holders who would be willing to serve as such committee. It would be unprofitable for the purpose of this report to speculate upon the various circumstances that might lead up to the formation of a committee for security holders and the personnel of such committee. Suffice it to say that either through the initiative of the houses of issue (and generally through their initiative) or through the initiative of the security holders themselves or others, some committee would soon be in the field.

Such committee when formed, whether formally or informally, would presumably busy itself immediately with the feasibility of a reorganization of the company, and assuming that reorganization is thought to be feasible, someone, whether it be such a committee, or individual creditors or the company, would in due course cause the initiation of 77B proceedings. As soon as these proceedings were instituted, we believe it would be a healthy and advantageous procedure for such committee to appear formally therein and, as suggested by Judge Hand in *In re Paramount-Publix Corp., supra,* petition the Court to determine their status. In the case of a committee, such procedure should necessitate, as a matter of routine for the information of all concerned, the filing of a written statement by each of its members in the reorganization proceedings which would make a public record of the following information:

(a) The amount and class of securities of, and claims against, the Debtor owned or represented by such person

(b) The occupation and principal business affiliation of such person

(c) A brief description of any present interests or connections of such person which substantially conflict with the securities or claims owned or represented by such person;

(d) Whether or not such person intends to seek any allowance to him from the trust estate as compensation for services rendered or as reimbursement for expenses incurred in connection with the proceeding or the Plan;

(e) The names of counsel representing such person. Counsel for the Committee should file a similar statement.

The foregoing having been filed as a matter of routine the committee could concurrently, or from time to time, petition the court for the court's approval of its proposed activities. Such petition would then be brought on for hearing after such notice as the court might order. At such hearing the court could determine in the light of the written statements of the committee members on file, supplemented by such evidence as might be adduced at the hearing, if, or to what extent, or upon what conditions, it could recognize the committee as a proper representative of security holders. Likewise, even if the committee were so recognized, the court could express itself as to whether, or under what conditions, the expenses to be incurred, and compensation for the services to be rendered by the committee would be allowed and charged to the trust estate.

In a similar manner, counsel for the committee could petition the court for a determination of their status, and in this connection it might be possible in many instances to acquaint the court with the character and amount of services which they anticipated they would be called upon to render, and also in a general way, with their ideas of the basis upon which they expected to be compensated. Indeed, in some instances, it might be appropriate for counsel from time to time to seek an allowance on account, where the proceeding is of long duration. In the nature of things, the amount of counsel fees of a committee depends to a large extent upon the results finally achieved. Nevertheless, in some cases counsel might justly be entitled to receive compensation on account from time to time in an amount at least sufficient to meet their overhead.

All such matters could be brought to the attention of the Court initially, or from time to time thereafter, and the court could rule thereon in the light of the situation as it unfolded. If at any time the court felt that it could not authorize the expenses contemplated by the committee, nor compensate the committee or its counsel for services to be rendered by them in the manner and amount expected by them, the committee and counsel would be put on notice of the court's attitude and could govern themselves accordingly.

Such a procedure would largely obviate the embarrassment to committee or counsel which sometimes occurs in reorganization proceedings under 77B when the committee and their counsel appear at the end of the proceedings after a plan has been consummated, sometimes after years of work, and seek allowances for fees and expenses in amounts conceded to be moderate, but nevertheless large in the aggregate, and the Court is without prior warning of the amount of the expenses or the extent of the services rendered.

It is too much to expect that a committee will incur expenses and its counsel render services in any substantial amount unless they can receive reasonable

assurance that they will not suffer any loss. The procedure suggested should prove not only advantageous to the committee and its counsel, but also to the court and the security holders, because thereby the court would have the power initially, and from time to time thereafter, to make its views on the subject of fees and expenses a matter of record for the guidance of all concerned.

Although, as we point out later, the law seems to be clear that the court has the power to compel security holders and creditors and their representatives and counsel who appear in reorganizations to file a statement therein of the character hereinabove described, it would seem equally clear that the court cannot force such persons to appear in the proceedings nor to secure the court's approval of their proposed activities. The court could invite such procedure, however, and, from what has been said, it is reasonable to suppose that in most instances it would be adopted.

What has been said in respect of committees is equally applicable to individual security holders and creditors and their direct representatives.

4. ADVISABILITY OF COURT RULE:

We shall now pause to consider from a practical standpoint to what extent court rules can be made effective to accomplish the procedural remedies affecting committees hereinbefore suggested. As well stated in Gerdes on Corporate Reorganizations, section 904, "The entire section (*i. e.*, 77B) evinces an intention on the part of Congress to give the court the jurisdiction and powers of *both* bankruptcy and equity receivership courts, burdened only with the limitations common to both."

There would seem to be no question as to the court's power to adopt rules to regulate the practice of the court and to facilitate the transaction of its business, so long as such rules do not enlarge or restrict jurisdiction or abrogate or modify the substantive law. (Title 28 U. S. C. A., Section 731, *Washington-Southern Nav. Co. v. Baltimore and P. S. B. Co.*, 263 U. S. 629, 68 L. Ed. 480 (1923).) It is our view that the rule which we are recommending does not transcend these limitations, and that the court has the power to enact a rule which will unqualifiedly require every person *appearing* in the 77B proceedings, including counsel, to file an informative statement of the character hereinabove described, and which will provide, in effect, that security holders' and creditors' committees and other persons directly representing them, and their counsel, may be denied compensation or reimbursement of expenses unless they formally appear in the proceedings and file such a statement.

A rule of such a character, in our judgment, would have a beneficial effect from a practical standpoint. It would not only effect a disclosure of pertinent facts affecting the status of such persons who usually appear in these proceedings, but it would also tend to encourage the appearance in the proceedings of committees and individuals who would otherwise not appear. Any conflicting loyalties of such persons who appeared would be disclosed to all concerned, and

the court could take appropriate steps to protect security holders and creditors against any prejudice that might otherwise result therefrom, and to prevent persons acting in self interest who appear in these procedings from masquerading as the representatives of security holders or creditors. Persons not electing to appear and therefore not subject to the rule would in most instances fall in the category of what the Commission designates as "entrepreneurs" and "reorganization adventurers."

By the use of the terms "entrepreneurs" and "reorganization adventurers" we do not wish to be understood as attaching any odium to persons who properly fall within such classification, nor do we wish it to be implied that such persons should be denied the opportunity to participate in reorganizations accomplished under 77B. It might well be that in some reorganizations such persons would be welcomed as being the only persons willing to undertake commitments which would permit a reorganization. However, the failure of such person to appear and comply with rule might well serve as a warning, in the absence of a satisfactory explanation, that he was not a genuine representative of security holders and creditors, and was acting in self interest.

We should point out that the Commission, and also Congressional committees, have recommended that Congress enact legislation which will modify existing procedure in 77B proceedings. Such recommendations have resulted in certain legislation being proposed in Congress, the most prominent of which is the Chandler Bill (H. R. 8046) which has already been passed by the House of Representatives and is now being considered by the Senate Committee on the Judiciary. While it seems probable that legislation will be enacted during the present session of Congress, which will tend to correct the abuses conplained of, an examination of the two most prominent bills on this subject, namely, the Chandler Bill and the Lea Bill (H. R. 6968) discloses nothing in the way of proposed legislation which would render the adoption of the rule we recommend nugatory if these bills or any of them become law. Nor do we know of any other proposed legislation which if put into effect would from a legal standpoint prevent the adoption of this rule nor render its adoption unnecessary or undesirable.

Furthermore, the Borah Act (S. 2849), which was approved August 25, 1937, prohibits any agreement in advance between the parties in interest or their attorneys for the purpose of fixing the amount of fees or other compensation of such parties in interest or their attorneys. It would seem that in all fairness some procedure should be set up whereby committees, attorneys and others could submit their proposed activities and expectation of compensation to the court in advance, so that the court might give warning with respect to the persons or services which were not to be compensated from the assets of the estate. Such persons would then know that they were rendering services without expectation of compensation unless they made arrangements for compensation otherwise than out of the assets of the estate.

We recommend that the United States District Judges of this district adopt a rule in substantially the following form:

"Rule.....

Every attorney who shall appear in any proceeding under Section 77B of the National Bankruptcy Act shall file therein, concurrently with such appearance or within such time thereafter as the court for good cause shown may allow, a verified statement in writing containing the following information:

(a) The amount and class of securities of, and claims against, the Debtor owned or represented by such attorney

(b) A brief description of any present professional employment or other present interest of such attorney, within his knowledge, which substantially conflicts with the interests of his client in such proceeding or with the securities or claims represented therein by such attorney;

(c) Whether or not such attorney intends to seek any allowance to him from the trust estate as compensation for services rendered and reimbursement for expenses incurred in connection with the proceeding or the Plan.

Every creditor, stockholder, security holder, reorganization manager, committee member or other representative (other than attorneys) of one or more creditors, stockholders or security holders of the Debtor who shall appear in any proceeding under said Section 77B shall file therein, concurrently with such appearance or within such time thereafter as the court for good cause shown may allow, a verified statement in writing containing the following information:

(a) The amount and class of securities of, and claims against, the Debtor owned or represented by such person;

(b) The occupation and principal business affiliation of such person;

(c) A brief description of any present interests or connection of such person which substantially conflict with the securities or claims owned or represented by such person;

(d) Whether or not such person intends to seek any allowance to him from the trust estate as compensation for services rendered or as reimbursement for expenses incurred in connection with the proceeding or the Plan;

(e) The names of counsel representing such person.

The failure to file a statement in conformity with this rule shall be sufficient reason for the denial of any allowance for services rendered or

reimbursement for expenses incurred in connection with the proceeding or the Plan.

Compliance with this rule shall not in itself accomplish intervention.

Where practicable the court invites persons affected by this rule to petition the court for approval of their proposed activities in connection with reorganizations."

While we believe that the adoption of the foregoing rule will prove beneficial, experience alone can demonstrate this. The adoption of the rule for a laboratory period, at least, should be the best method of determining its efficacy.

Respectfully submitted,

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Chairman,

B. P. CALHOUN,
EWELL D. MOORE,
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Committee.